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NEWS

Stuck in an arbitral Groundhog Day

A groundhog (Matt MacGillirray, Flickr Creative Commons)

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The ICSID Convention and arbitration rules do not contemplate the filing of a request for reconsideration. Neither do the UNCITRAL rules. Yet, in recent years, requests for reconsideration of tribunal decisions and orders have become commonplace in ICSID and UNCITRAL investment arbitrations. **Jeffery Commission**, senior counsel with Vannin Capital and a former practitioner at Freshfields Bruckhaus Deringer, gives the most detailed information to date on the frequency of such requests, the identity of the parties filing them, and their disposition by tribunals.

Almost 18 months after a tribunal renders a partial award on jurisdiction, a party submits a request for reconsideration of that award. In its request, the claimant explains that the tribunal has the power to grant the request, and that the resignation of one tribunal member – who participated in the drafting of the partial award – warrants the tribunal's reconsideration of its prior award. The tribunal disagrees, concluding that the claimant's request is procedurally inappropriate, neither timely nor efficient, and that, in any event, the tribunal is without jurisdiction to reconsider the prior award.

In so doing, the tribunal concludes that: "[t]here is little point in any arbitration tribunal making jurisdictional decisions intended and understood to be final and binding on the parties if, much later, a disappointed party can reargue its jurisdictional case and turn the arbitration into the equivalent of Sisyphus's torment or the film 'Groundhog Day'".

The year was 2005 and the tribunal (comprised of **VV Veeder QC, J William Rowley QC**, and **Michael Reisman**) recorded that conclusion in a footnote on page 86 of its 307-page final award in *Methanex v United States of America*. Fast forward 11 years, and we have now witnessed a dramatic increase in the number of requests for reconsideration in ICSID and UNCITRAL arbitrations. Although relatively uncommon in investment arbitration at the time of the *Methanex* arbitration, 77 reconsideration requests were filed in investment arbitrations between 1985 and 1 November 2016, the majority of them in the last four years.

Requests for reconsideration have been filed by respondents and claimants alike, as well as by non-disputing parties. The focus of those requests has been a wide array of tribunal decisions and orders, including interim measures, bifurcation, admissibility of evidence, jurisdiction, and liability, among others. The practice has become so prevalent that there have even been instances of parties seeking reconsideration of tribunal decisions on reconsideration.

The observations of the *Methanex* tribunal could not have been more prescient.

Nothing new

The request for reconsideration, as a procedural mechanism, is not new in UNCITRAL and ICSID arbitrations. The first request for reconsideration in an ICSID arbitration was filed more than 30 years ago, in August 1985, by the respondent in *Maritime International Nominees Establishment (MINE) v Guinea*. In that request, Guinea sought reconsideration of the tribunal's denial of its emergency request for relief from MINE's attachments of Guinea's assets in Europe in relation to the enforcement of an American Arbitration Association award.

The tribunal took no immediate action in response to Guinea's reconsideration request, but later ruled in a decision on provisional measures four months later (in December 1985) that MINE's actions breached the ICSID Convention, and ordered it to dissolve the attachments. In December 1985, MINE proceeded to file its own application for reconsideration of the decision on provisional measures, an application denied by the tribunal in February 1986.

A few years later, in March 1990, the respondent in *Biloune v Ghana Investments Centre* filed a request for reconsideration under the UNCITRAL Arbitration Rules, the first of its kind in an investment arbitration. In *Biloune*, Ghana Investments Centre sought reconsideration of the tribunal's award on jurisdiction and liability from October 1989, claiming that testimony at the hearing was "tainted by perjury".

The *Biloune* tribunal denied the respondent's request in its award on damages and costs in June 1990, concluding that the UNCITRAL arbitration rules "make no provision for reconsidering an award". Having said that, the *Biloune* tribunal acknowledged that it would not hesitate to reconsider its earlier award were it shown by credible evidence that "its determinations were the product of false testimony", but that no such evidence had been adduced.

Increasing frequency

What is new about reconsideration requests in ICSID and UNCITRAL arbitrations is therefore not the use of them, but rather the frequency with which they have been filed in the last four years. Between 2013 and 2016, 48 reconsideration requests have been filed in ICSID and UNCITRAL arbitrations – an average of 12 requests per year. In contrast, between 1985 and 2012, only 29 reconsideration requests were filed, an average of one request per year.

In total, 77 requests for reconsideration were filed between 1985 and 2016, 60 in ICSID arbitrations and 17 in UNCITRAL arbitrations.

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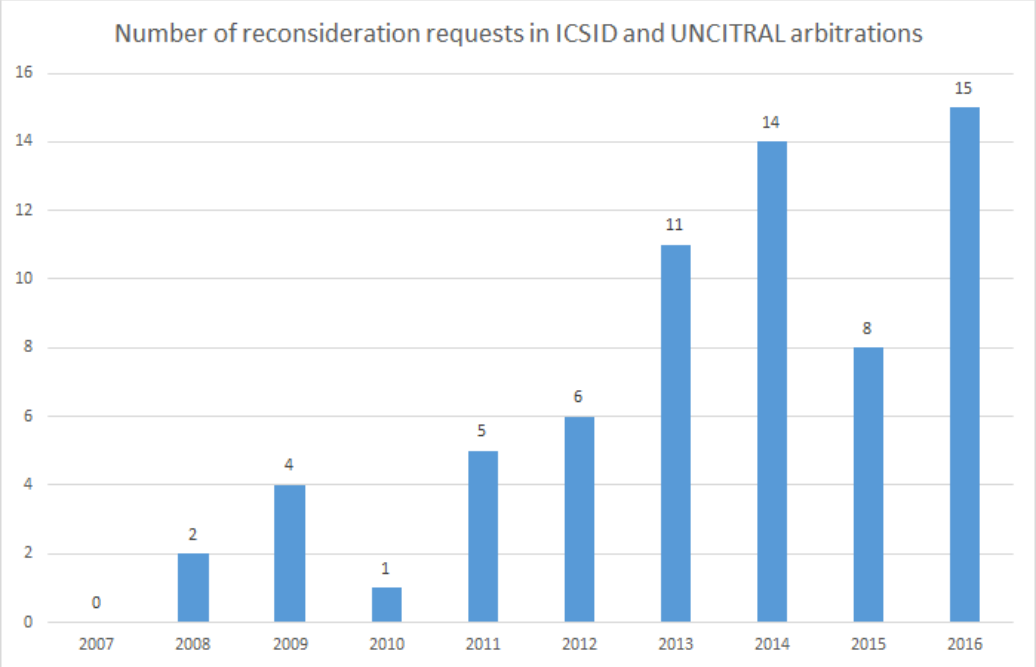
A snapshot of the last 10 years demonstrates the recent dramatic increase in reconsideration requests:



The request for reconsideration is not the exclusive province of either claimant or respondent. Between 1985 and 2016, claimants have filed 33% of reconsideration requests (25 in total), and respondents have filed 61% (47 in total). The remaining 6% (five in total) were filed by non-disputing parties.

In at least eight ICSID and UNCITRAL arbitrations, there have been multiple requests for reconsideration in the same arbitration, ranging from two to four times per arbitration.

To be sure, the number of reconsideration requests submitted in the last 10 years remains small when compared to the overall number of investment arbitrations filed in the period. For instance, during the last 10 years, ICSID reported an increase in cases registered from 130 in the 2007 financial year to 247 in the 2016 financial year.

Yet, as compared to other procedures that parties may initiate during the course of proceedings, reconsideration requests rank near the top. In the 2016 financial year (1 July 2015 – 30 June 2016), reconsideration requests were more frequently filed by parties in ICSID arbitrations (11 in total) than applications for disqualification of arbitrators, manifest lack of legal merit objections, requests for interim measures, or requests from non-disputing parties, to name a few. The difference between those procedures and reconsideration requests is straightforward: requests for reconsideration are not contemplated under the ICSID regime, while the other procedures are.

What is more, it is not only the volume of reconsideration requests, but the expanding range of tribunal decisions and orders those requests seek to address, including decisions on: provisional measures; bifurcation; document disclosure requests; non-disputing party participation; admissibility of evidence; jurisdiction; liability; stays of enforcement; and security for costs. And in at least three instances in the last two years, parties have sought reconsideration of tribunal decisions or orders on reconsideration requests themselves.

Finally, this analysis of reconsideration requests is likely under-reporting the true number of such requests, for two reasons.

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First, not all requests for reconsideration are publicly available, either because they are not reported as procedural details on the ICSID website, or because the order, decision, or award in an ICSID or UNCITRAL arbitration is not available.

Second, this analysis does not include instances when parties have sought reconsideration through other means. For instance, in October 2014, the claimants in *Minotte v Poland* filed a request for interpretation under article 55 of the ICSID Additional Facility Rules.

In dismissing that request, the tribunal concluded that what the claimants had filed was not in fact a request for interpretation of its decision, but "rather a request that the tribunal reconsider and alter its decision".

Time for a framework?

With an average of 12 reconsideration requests filed each year between 2013 and 2016, it may be time for users of ICSID and UNCITRAL arbitration to consider a framework to handle these requests. Absent such a framework, parties will be free to file reconsideration requests at any time, in respect of any tribunal decision or order, and without any disincentive to submit repeated requests within the same arbitration.

To suggest, as some users might, that providing a framework legitimises reconsideration requests as a procedure and will lead to further requests, misses the point: as a practical matter, these requests are here to stay and show no signs of abating.

The adoption of conditions on reconsideration merely seeks to bring order to a procedure that is otherwise without any restrictions, and in no way prejudges the hotly debated question of whether or not tribunal decisions on jurisdiction, liability or merits have *res judicata* effect (as opposed to decisions on procedural matters, which are routinely reviewed and revised by tribunals). For example, see these *GAR* reports of recent decisions on reconsideration requests in cases relating to Tanzania, Ecuador and Venezuela.

One approach, requiring no rule amendments, would be to include a discussion of reconsideration requests at the first session or first procedural meeting in every arbitration. Of course, this would require the parties to confer on a tribunal the power to reconsider its decisions – a power that the tribunal would not otherwise have under the express terms of the ICSID Convention or UNCITRAL rules.

Granting the tribunal that power by party agreement may serve the interests of efficiency: if requests for reconsideration are going to be made, it may be better to have in place a strict framework under which the power may be exercised, rather than rely on case-by-case determinations.

That framework could include a deadline for filing reconsideration requests (such as seven or 14 days after the issuance of a decision or order, a requirement common in national court systems); a high standard for granting reconsideration requests (for example, the need to correct clear error or prevent manifest injustice); an interim award of costs in the case of unsuccessful reconsideration requests given the low rate of success for such applications (less than 5%); and a condition that only parties to the arbitration – claimants and respondents – are permitted to file reconsideration requests.

The ICSID secretariat could facilitate this approach by including the issue of reconsideration requests in the draft agenda for first sessions, as well as the draft Procedural Order No.1.

In the event an arbitration is already pending – without having addressed reconsideration earlier on – a tribunal could issue an order addressing these considerations upon receiving its first reconsideration request, so as to have a procedure in place for subsequent requests, which have become increasingly common.

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Appendices including data on the 77 requests for reconsideration referenced in this study will be included in the forthcoming book "Procedural Issues in International Investment Arbitration", co-authored by Commission and Gibson Dunn & Crutcher counsel ***Rahim Moloo****,* to be published by Oxford University Press in 2017.

Commission joined Vannin Capital from Freshfields as senior counsel in January. He remains based in Washington, DC.

The 1993 film "Groundhog Day," starring Bill Murray